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No. 85-1574

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

HAROLD E. ANDERSON,
Respondent.

On Petition for Writ of Certiorari
To The Missouri Court of Appeals
Eastern District

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Missouri State Court, in complete conformity with the decisions of this Court authorizing submission of general negligence issues to juries in FELA actions, properly submitted general negligence issues to the jury in this FELA action, as is also done in other state court negligence actions in which the substantive law and evidence provide for recovery based upon a finding of general negligence.

II. Whether any state regulation of or undue burden is imposed upon interstate commerce when a Missouri State Court permits an FELA plaintiff to bring an action in state court pursuant to the FELA to vindicate his federal rights pursuant to federal law and the jury is properly instructed in accordance with the federal substantive law.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iii
Jurisdictional Statement	1
Statement of The Case	2
Argument	3
Conclusion	19

TABLE OF AUTHORITIES

Bair v. St. Louis-San Francisco Railway Co., 647 S.W. 2d 507, 510 (Mo. banc, 1983) *cert. denied sub. nom.* Burlington Northern, Inc. v. Bair, ____ U.S. ____, 104 S.Ct. 107, (1983)	3
Baltimore & O.R. Co. v. Kepner, 314 U.S. 44, 52, 62 S.Ct. 6, 9-10 (1941)	17
Blair v. Baltimore & O.R. Co., 323 U.S. 600, 604, 65 S.Ct. 545, 547 (1945)	4, 5
Boeing Co. v. Shipman, 411 F.2d 365, 371 (5th Cir. 1971)	5
Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Company, 393 U.S. 130, 144, 89 S.Ct. 323, 331 (1968)	18
Brown v. Gerdes, 321 U.S. 178, 189-190, 64 S.Ct. 487, 492-493 (1944)	16

Chicago, Rock Island & Pacific R.R. v. Melcher, 333 F.2d 996, 999-1000 (8th Cir. 1964) 15

Collins v. American Buslines, Inc., 350 U.S. 528, 531, 76 S.Ct. 582, 584 (1956) 18

Dunn v. St. Louis-San Francisco Railway Co., 621 S.W. 2d 245, 254-255 (Mo. banc 1981), *cert. denied sub. nom.*, Burlington Northern Railroad Co. v. Dunn, 454 U.S. 1145, 102 S.Ct. 1007 (1982) 3

G. D. Searle & Co. v. Cohn, 455 U.S. 404, 408, 102 S.Ct. 1137, 1141 (1982)..... 16

Griffith v. St. Louis-San Francisco Railway Co., 559 S.W.2d 278, 280 (Mo.App. 1977), *cert. denied,* 436 U.S. 926, 98 S.Ct. 2821 (1978)..... 3

Lavender v. Kurn, 327 U.S. 645, 653, 66 S.Ct. 740, 744 (1946) 16

Lyons v. State of Oklahoma, 322 U.S. 596, 601 64 S.Ct. 1208, 1212 (1944)..... 16

Marshell v. Burlington Northern, Inc., 637 S.W.2d 168, 169 (Mo.App. 1982) 3

Meredith v. Missouri Pacific Railroad Co., 467 S.W.2d 79, 82 (Mo. 1971)..... 16

Minneapolis & St. Louis Railroad Co. v. Bombolis, 241 U.S. 211, 36 S.Ct. 595 (1916)..... 16

Mondou v. New York, New Haven & Hartford Railroad Company, 223 U.S. 1, 32 S.Ct. 169 17

Ricketts v. Kansas City Stock Yards Co., 484 S.W.2d 216, 221-222 (Mo. banc 1972) 5

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 507-509, 77 S.Ct. 443, 448-450 (1957)..... 15

Royster v. Pittman, 691 S.W.2d 305, 308 (Mo.App. (1985) 6

Shenker v. Baltimore & Ohio Railroad Co., 374 U.S. 1. 7, 83 S.Ct. 1667, 1671-1672 (1963) 15

Sinkler v. Missouri Paci Railroad Company, 356 U.S. 26, 329, 78 S.Ct. 758, 762 (1958) 5

Union Pacific R. Co. v. Hadley, 246 U.S. 330, 38 S.Ct. 318 (1918)..... 3, 4, 16

Webb v. Illinois Central Railroad Co., 352 U.S. 512, 77 S.Ct. 451 (1957)..... 16

White v. St. Louis-San Francisco Railway Co., 602 S.W.2d 748, 754 (Mo.App. 1980) 3

Statutes:

45 U.S.C. §51 et. seq. 5, 17

§400.7-204 R.S.Mo. (1981) 6

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JURISDICTIONAL STATEMENT

Respondent (hereinafter, "plaintiff") accepts petitioner's (hereinafter "defendant") Jurisdictional Statement with the following exceptions: Plaintiff specifically denies that the pattern jury instructions defendant challenges are in any manner unconstitutional or that the judgment of the Missouri Court of Appeals is contrary to any applicable decision of this Court or the highest courts of the several other states.

STATEMENT OF THE CASE

Defendant's Statement Of The Case does not constitute a full and fair statement of facts relevant to the issues herein. In order to avoid repetition additional relevant facts will be set forth in the argument.

ARGUMENT

I.

Absolutely No Equal Protection Violation Occurred As A Result Of Submitting The Instant Case On Plaintiff's Verdict Directing Instruction Patterned After MAI 24.01. MAI 24.01 Is Consistent With The Substantive Law Of The FELA And, Accordingly, The Form Of The Instruction Is A Question To Be Determined By State Law.

Defendant's contentions concerning MAI 24.01 have previously been raised and consistently rejected in *Bair v. St. Louis-San Francisco Railway Co.*, 647 S.W.2d 507, 510 (Mo. banc, 1983) *cert. denied sub. nom. Burlington Northern, Inc. v. Bair*, ____ U.S. ____, 104 S.Ct. 107, (1983), *Dunn v. St. Louis-San Francisco Railway Co.*, 621 S.W.2d 245, 254-255 (Mo. banc 1981), *cert. denied sub. nom., Burlington Northern Railroad Co. v. Dunn*, 454 U.S. 1145, 102 S.Ct. 1007 (1982); *Griffith v. St. Louis-San Francisco Railway Co.*, 559 S.W.2d 278, 280 (Mo.App. 1977), *cert. denied*, 436 U.S. 926, 98 S.Ct. 2821 (1978); *White v. St. Louis-San Francisco Railway Co.*, 602 S.W.2d 748, 754 (Mo.App. 1980); *Marshell v. Burlington Northern, Inc.*, 637 S.W.2d 168, 169 (Mo.App. 1982).

Plaintiff's verdict directing instruction and MAI 24.01 completely comply with the substantive law of the FELA, and defendant has not contended otherwise. Almost 70 years ago, this Court authorized the submission of a railroad defendant's negligence under general negligence instructions. In *Union Pacific R. Co. v. Hadley*, 246 U.S. 330, 38 S.Ct. 318 (1918), this Court rejected the defendant railroad's challenge to a submission of general negligence to the jury in emphatic terms, speaking through Justice Holmes:

> "On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as

> to each. *But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question.* We are not left to the mere happening of the accident. There were block signals working on the road that gave automatic warning of danger to 501, and which it was negligent to pass, seen or unseen, as the engine crew knew where they were and that another train was not far ahead. There was a snow storm raging which the jury might have found to have been of unprecedented violence, and it was open to them to find in view of circumstances unnecessary to detail that the dispatcher ought not to have sent out Extra 510 West as he did and that he was grossly wrong in not allowing 504 to come in and in not leaving it to 501 to bring back the disabled engine. It might have been found improper to leave the conductor of 501 at Potter. It is superfluous to say more upon this point."

246 U.S. at 332-333, 38 S.Ct. at 319 (emphasis supplied). Consequently, *Hadley* expressly authorizes submission of general negligence issues to the jury under the FELA.

The principle that a finding of general negligence is appropriate and sufficient under the FELA has, since *Hadley,* been reaffirmed by this Court. The holding in *Hadley* was reiterated by this Court in *Blair v. Baltimore & O.R. Co.,* 323 U.S. 600, 604, 65 S.Ct. 545, 547 (1945), as follows:

> "The negligence of the employer may be determined by viewing its conduct as a whole. Union Pacific Railroad Co. v. Hadley, 246 U.S. 330, 332, 333, 38 S.Ct. 318, 319, 62 L.Ed. 751. And especially is this true in a case such as this, where the several elements from which negligence might be

> inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others."

This Court's decisions in *Hadley* and *Blair,* therefore, expressly authorize submission of and a finding in favor of a plaintiff and against a defendant railroad, under the FELA, based upon said defendant's general negligence.

The FELA is an avowed departure from common law negligence rules of liability, and said common law rules are not to be followed or depended upon in interpretting the FELA. *Sinkler v. Missouri Pacific Railroad Company,* 356 U.S. 326, 329, 78 S.Ct. 758, 762 (1958). The differences between the substantive law of the FELA and Missouri common law negligence actions justify submission of general negligence issues in the former, while authorizing submission of specific negligence issues in the latter. This was recognized and explained by the Missouri Supreme Court in *Ricketts v. Kansas City Stock Yards Co.,* 484 S.W.2d 216, 221-222 (Mo. banc 1972). The Missouri Supreme Court explained the general submission of negligence in MAI 24.01 as follows:

> "The Act [F.E.L.A.] provides an employer under it shall be liable "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees." 45 U.S.C. §51. As recently said in Boeing Co. v. Shipman, 5th Cir., 411 F.2d 365, 371: "Slight negligence, necessary to support an F.E.L.A. action, is defined as 'a failure to exercise great care,' and that burden of proof, obviously, is much less than the burden required to sustain recovery in ordinary negligence actions. Prosser, Law of Torts, §34, p. 186 (3d ed. 1964)"; see also Prosser, Law of Torts, §82, p. 560, noting as to the F.E.L.A. negligence; "This has been said to reduce the extent of the negligence required, as well as the quantum of proof necessary to establish it, to the 'vanishing point.' " *This would seem to be a reason for MAI to allow a general submission of negligence in F.E.L.A. cases."*

484 S.W.2d at 221 (emphasis supplied). The substantive differences, therefore, between the ordinary Missouri common law negligence action and an action premised upon the FELA completely justify the differences in the verdict directing instructions utilized.

Furthermore, defendants contention that general negligence submissions are prohibited under Missouri law, and that railroad defendants are treated like no other defendants against whom negligence actions are brought, is simply incorrect. In a recent decision in an action brought to recover damages pursuant to §400.7-204 RSMo (1981) which requires a defendant to exercise such care "as a reasonably careful man would exercise under like circumstances", the Missouri Court of Appeals ruled not only that a *general negligence* submission was appropriate, but also recommended that the submission of defendant's negligence be based upon pattern instruction MAI 31.02(3), Verdict Directing—Res Ipsa Loquitur—General, stating:

> "[6, 7] Pittman's [Defendant] second point suggests instructional error. Instruction No. 7, the verdict director, was based on multiple acts of negligence and was a modification of MAI 17.02. Pittman says *this instruction failed to instruct* on the warehouseman's duty and *failed to set out the specific acts or omissions of Pittman which constituted a breach of the duty of negligence.*
>
> [8] For the submission of an action for *general negligence* against a warehouseman bailee, MAI 31.02(3), based upon the *res ipsa loquitor* doctrine, would have been appropriate in this case."

Royster v. Pittman, 691 S.W.2d 305, 308 (Mo.App. 1985) [Bracketed material and emphasis supplied]. Where the *substantive law and the evidence* support one, as in *Royster* and the instant case, *general negligence* and even *res ipsa loquitur* submissions are proper and provided for by Missouri law and MAI. Moreover, FELA defendants are not treated differently from all other defendants against whom negligence actions are brought in the Missouri state courts.

Here the substantive law, as declared by this Court in *Union Pacific R. Co. v. Hadley,* 246 U.S. 330, 38 S.Ct. 318 (1918) and *Blair v. Baltimore & O. R. Co.,* 323 U.S. 600, 65 S.Ct. 545 (1945), expressly authorize a general negligence submission. Moreover, as discussed below, the evidence unquestionably makes this an appropriate case for such a submission.

Plaintiff's verdict director submitted alternative findings of negligence to the jury: "First, defendant either failed to provide: reasonably safe conditions for work, or reasonably safe appliances,...". Plaintiff presented evidence that overwhelmingly established defendant failed to provide reasonably safe working conditions due to the fact that the metal shavings, dust, dirt and debris that were created and allowed to accumulate and defendant failed to provide reasonably safe appliances due to the total inadequacy of the eye protective equipment defendant issued which allowed metal shavings, and other debris to get on the face, in the vicinity of the eyes and the eyes of plaintiff and other workers. As more fully set forth below the evidence presented at trial fully justified the submission of the case to the jury on the alternative findings set forth in plaintiff's verdict directing instruction. Indeed, there was more than sufficient evidence for the jury to find negligence in both defendant's failure to provide reasonably safe conditions for work or reasonably safe appliances.

Plaintiff began working for defendant on August 9, 1976, washing and cleaning cabooses and business cars. (T. 487) Plaintiff received no instructions or training of any type pertaining to eye protection. (T. 488, 489) Plaintiff ws assigned to work on the hopper car assembly line at position number 4 about two months before his injury on May 6, 1977. (T. 490) No foreman showed plaintiff how to do the job; he was merely told to "get with Emmitt [Davenport, a co-worker], and do the job". (T. 491) Davenport had been put on the hopper car assembly program with no training or prior experience and had been working at position 4 for eight or nine months before plaintiff was injured. (T. 272, 274)

At defendant's Consolidated Freight Car Shop, defendant manufactured hopper cars on an assembly line basis. The cars were assembled at different positions on the line and the end result was a completed hopper car. A steel beam called a center sill ran the length of the hopper car and formed the main support. (T. 83) The center sill was hollow with a partial opening along the bottom with a lip on either side running its entire length. (T. 83) At position number 3, six hopper chutes were attached to the center sill in 3 pairs, with a chute on each side of the center sill. (T. 121, 255) Plaintiff worked at position number 4. At position 4, a pre-formed piece of metal called a hog trough was put over the hopper chutes and the center sill. (T. 83, 121, 122) There were pre-drilled holes in each of these pieces which did not align properly and an air-powered reamer was regularly used to ream out the holes. (T. 122, 241, 242) Twelve holes in each chute were reamed at position 4. All but two holes involved all three thicknesses of metal. (T. 90, 241) Employees stuck special bolts called huck-bolts in each reamed hole by reaching up inside the center sill from beneath the hopper car. (T. 126, 127, 167, 168, 283, 284, 501, 505) Employees were required to look up at the hole while sticking the bolts. A huck-gun was used to tighten and fasten the bolts in place and snapped off the end of the bolt. (T. 96) In addition, the workers at position 4 would hammer clamps in place to hold the air lines for the brake system. (T. 296) Once this work at position four was completed the car was moved to position five where the sides were hung and other work was done on the car. (T. 529).

Plaintiff and several witnesses, all familiar with position 4, testified as to the type of work done there, the tools and equipment used, and the unsafe conditions that existed at position 4. At trial, a full scale model of a partially constructed hopper car was offered and received into evidence as Plaintiff's Exhibit No. 3. (T. 182, 183) This model consisted of a portion of the center sill with a portion of the hopper chute and hog trough attached and was used in demonstrating the work performed at position

number four. (T. 87, 89, 90, 189, 190, 239, 279, 280) An air-powered reamer with a reaming bit was offered and received into evidence as Plaintiff's Exhibit No. 4. (T. 182, 183) A huck-bolt of the same variety as used at position four was in evidence as Plaintiff's Exhibit No. 4A. (T. 182, 183) By use of the model, reamer and huck-bolt, witnesses demonstrated to the jury the manner in which the work was performed.

Defendant issued plaintiff "safety" glasses marked as Plaintiff's Exhibit No. 16. Plaintiff was assigned to work with Emmitt Davenport who knew nothing about eye protection and wore the same type of safety glasses as plaintiff. (T. 275, 276, 278, 491) No one took exception to plaintiff wearing these safety glasses or told him he should be wearing anything different. (T. 493, 494, 514) These safety glasses issued to plaintiff and worn by him at the time of his injury were nothing more than spectacles, horned rimmed glasses with perforated plastic side shields. (T. 366, 491) These glasses were inadequate and afforded plaintiff no more protection than regular eye glasses. (T. 365-366) Metal shavings from the work at position 4 got in behind the glasses, in the vicinity of the eyes and also into the eyes themselves through the gaps at the top and bottom of the frame, at the brow, around the cheeks and adjacent to the nose. (T. 501, 502) These glasses, Plaintiff's Exhibit 16, simply did not prevent metal shavings, created by the work at position 4, from getting into the eyes and area of the eyes of employees, including plaintiff. As set forth in more detail below, employees repeatedly complained about these glasses and requested better eye protection prior to plaintiff's injury.

Apart from the fact that the glasses provided to plaintiff were totally inadequate, there was overwhelming evidence that the working conditions at position number 4 where plaintiff worked were *not* reasonably safe and in fact created hazards for the workers. The jury heard the detailed and substantial testimony of plaintiff and several witnesses, all of whom had personally worked at position number 4 and experienced the same hazardous working conditions at position number 4.

As set forth above, an air-powered reamer was used at position number 4 to ream out pre-drilled holes in the hog troughs, hopper chutes and center sills to allow huck-bolts to fit through. (T. 122, 242) The reamer used at position number 4 was powered by compressed air and had an exhaust vent which pointed forward toward the front where the reamer bit came into contact with the metal to be reamed. (T. 93, 281) The exhaust from the reamer caused metal shavings lying on and about the center sill and slope sheets to be blown about striking the employees in the face, vicinity of the eyes and in the eyes. (T. 93-94, 192, 242, 281, 501) In total there were six hopper chutes in three pairs attached to each side of the center sill. (T. 282) Of the twelve holes at each chute all but two involved reaming all three thicknesses of metal. (T. 90, 241) Reaming the holes would generate a lot of metal shavings, which would collect on the slope chutes and center sill of the hopper car. (T. 93, 94. 241, 242, 258, 507, 508) Some of the metal shavings would fall through to the other side where they would collect on the lips of the center sill of the car or fall to the floor while the rest of the shavings would stay on the same side as the reamer. (T. 95, 105, 109, 110, 153, 205, 500, 508)

In reaming the holes the workers were required to crawl into the center of the hopper chute from underneath, stand on the floor, and lean along the length of the hopper chute supporting themselves with their legs, elbow, and shoulder while holding the reamer to get up to the holes. They could not do the job any differently, nor were they ever instructed to do the job any differently. (T. 90, 91, 148, 149, 190, 239, 240, 322, 323, 501) The metal shavings would be blown by the exhaust from the reamer, and would bounce off of the hopper chute (also called the slope sheet), the hog trough, and the center sill and would get in the clothes, hair, face, eyebrows, in the vicinity of the eyes, and in the eyes of the workers on numerous occasions. (T. 93, 94, 192, 193, 265, 282, 501) Hot reamer shavings would come out, stick, and burn through the employees clothes. (T. 241) Dirt, dust,

metal shavings and rust that would collect on the hopper chute would be blown about by the exhaust. (T. 242)

Employees were also required to stick huck-bolts at the number 4 position. The only way to stick the huck-bolts into the holes was to crawl beneath the center sill, squeeze in between the hopper chutes and look up toward and reach in from directly beneath the holes with one hand while using the other hand or elbow for support. (T. 126, 127, 167, 168, 283, 284, 501, 505) Shavings which had collected on the lips on the inside of the center sill would fall down when employees stuck the bolts in the holes and would get into the clothes, hair, face, the vicinity of the eyes, and in the eyes. (T. 285, 501, 502, 504) The gloves which the workers wore to protect their hands from the shavings and sharp surfaces had stiff sides which extended over the wrist and brushed down metal shavings into the employees' faces while they were sticking the huck-bolts. (T. 166, 167, 176, 177, 178, 284, 285, 506) The hazards from the metal shavings falling into employees' faces and eyes was increased when the defendant required one worker to stick bolts at the same time another reamed or used the huck gun to speed production. (T. 159, 160, 163, 164, 180, 181, 248, 294, 503) The reaming would generate even more shavings which would collect on the center sill and fall through the opening while the impact of the huck gun snapping off the bolts would shake additional shavings loose from the impact which in turn would fall onto the face of the worker inserting the huck-bolts. (T. 97, 154, 294, 295, 504) Additional shavings would fall into the employees' faces while hammering clamps in place to hold the air lines for the brake system. (T. 168, 169, 295, 296, 504, 505) Further, the shavings would collect on the floor along the length of the car where they would be allowed to accumulate because there were no laborers provided to clean up along the line. (T. 110, 242, 243, 292, 293) When wind would blow through the open doors of the freight car shop, the metal shavings, particles, dust and other debris which had accumulated would blow around. (T. 197)

The jury heard substantial testimony from plaintiff and several witnesses that they had repeatedly complained about the hazardous conditions they personally experienced while working at position number four. Complaints had been made personally to the foremen and the problems and hazards were brought up numerous times at safety meetings. (T. 113, 192, 195, 244, 246, 228, 499, 500, 502, 503) Complaints were made that the shavings were being blown around by the exhaust and back into the clothes, hair, face, vicinity of the eyes and the eyes of the workers while they were reaming. (T. 111, 245, 501, 502) Similarly, complaints were also made about the shavings falling down on the workers while they were sticking the huck-bolts underneath the center sills and getting in the clothes, hair, face, vicinity of the eyes, and the eyes of the workers. (T. 501) Plaintiff and the witnesses all complained about the accumulation of the shavings, dirt, dust and debris and requested laborers be provided to clean up at position number four. (T. 193, 287, 288, 500, 508) There was also testimony that the workers were not allowed enough time to clean up the shavings themselves and were discouraged in their attempts to do so. (T. 178, 316, 317) Despite numerous complaints nothing was ever done before plaintiff was injured. (T. 112, 132, 288, 289) There was also the overwhelming evidence of numerous complaints about particles, dust, and metal shavings getting behind the safety glasses marked Plaintiff's Exhibit No. 16, into the vicinity of the eyes and in the eyes themselves.

The personal experience these witnesses had with the inadequate eye protection afforded by the safety glasses (Pl. Ex. 16), was further supported by the expert testimony of Mr. James O'Neal. Taking into account the conditions at position number four, Mr. O'Neal testified unequivocally that the safety glasses marked Plaintiff's Exhibit No. 16 were totally inadequate for the eye safety hazards encountered at position number 4 because of the gaps above the eyebrow and at the side. (T. 362-366) Mr. O'Neal was Director of Industrial Services for the National Society to Prevent Blindness, working at their offices

in New York for almost 28 years. (T. 342) As the representative from the National Society to Prevent Blindness, Mr. O'Neal was intimately involved with the American National Standards Institute (ANSI) which promulgated eyewear safety standards. (T. 344-349) Prior to this employment Mr. O'Neal had worked as a machinist and was familiar with air-powered reamers, having used them to ream metal. (T. 356) Mr. O'Neal was familiar with hopper cars and with a hopper car assembly program. (T. 362)

The evidence overwhelmingly showed that the safety glasses (Plaintiff's Exhibit 16) were totally inadequate. The jury heard testimony that other eye protective equipment was readily available on the market that would have afforded plaintiff the necessary protection in light of the eye safety hazards encountered at position number 4. Mr. O'Neal gave his opinion as an expert, which was further supported by the witnesses at trial, that the black rubber frame goggle (also called the black Bouton goggle) marked Plaintiff's Exhibit 12 and admitted into evidence, when worn in combination with a face shield attaced to the hard hats which the workers wore, Plaintiff's Exhibit No. 11, would provide adequate protection, preventing metal shavings from getting in the face, in the vicinity of the eyes and most importantly in the eyes themselves. (T. 116-118, 195, 222, 286, 364-369, 586) Unlike the "safety" glasses (Pl. Ex. 16) issued to plaintiff which had numerous gaps permitting the entry of metal shavings into the area of the eye, the black rubber goggles (Pl. Ex. 12) recommended by O'Neal were form fitting, were contoured, and had a wide rubber lip. (T. 369) Unlike the "safety" glasses (Pl. Ex. 16), the black rubber goggles always provided a terrific fit. (T. 369) Of course, plaintiff was never provided these black rubber frame goggles or face shield prior to his injury. Additionally, the jury heard testimony from Mr. O'Neal that a proper eye safety program would tailor the eye protection to the particular conditions and hazards encountered at each job. (T. 359-361) Defendant had no eye protection program

during the time of the hopper assembly program. The employees received no instructions, training or classes as to the eye hazards they would encounter, nor were there any instructions or supervision in the proper selection and use of eye protective equipment. (T. 84, 85, 100, 187, 237-239, 273, 275, 488, 492-494)

At the time of the occurrence on May 6, 1977 plaintiff was working at position number four. (T. 503) He first felt something unusual at about 2:00 or 2:30 that Friday afternoon. (T. 506) He was reaming the last three holes on the end of the chute when he first felt something unusual. (T. 507) These holes were adjacent to the slope sheet. (T. 507) He had previously been sticking huck-bolts under the sill. (T. 507) The working conditions were as previously described. (T. 507) Plaintiff reamed the last three holes and felt his eye burning. (T. 508) It reamed the last three holes and felt his eye burning. (T. 508) It was an irritated feeling, like a flashburn, a burn to the eye caused by arcing a weld too close to a worker. (T. 508) Flashburns were frequent occurrences and would last about two or three days. (T. 509) Plaintiff went to his foreman's office and got some eye wash to wash his eye and returned to work. (T. 509) Plaintiff was off work on Saturday and Sunday. (T. 510) He stayed at home with the lights off because he could not stand the light. (T. 510) When plaintiff returned to work on Monday his eye still burned. (T. 510) Plaintiff continued to complain to his foremen about the injury to his eye and received only minor first-aid treatment up until the time that he was sent to see the Frisco doctor, Dr. Stewart, who drilled in plaintiff's eye and removed a piece of steel. (T. 510, 512). Ultimately his eye was enucleated (surgically removed) and a prosthetic conformer implanted.

From the foregoing it is clear that the evidence overwhelmingly established that the injury to plaintiff rsulted from the total inadequacy of the safety glasses that plaintiff was issued and was wearing at the time of his injury. The evidence clearly demonstrates that the safety glasses completely failed to protect

plaintiff from the hazardous conditions he encountered while working at position number 4. Had plaintiff been provided the rubber goggles (Pl. Ex. 12) and face shield (Pl. Ex. 11) described by expert witness O'Neal his injury could have been avoided.

The applicable substantive law and the evidence in the instant case completely justifies plaintiff's submission under MAI 24.01, even though specific negligence submissions are customarily utilized in ordinary Missouri common law negligence actions. Here, several aspects of the working conditions (i.e. accumulation of shavings, blowing of shavings by the wind, shavings being propelled by the reamer bit and exhaust, accumulated shavings dropping on employees while sticking bolts) were all closely interwoven in a single pattern comprising the unsafe working conditions to which plaintiff was exposed. Rather than being separate assignments or grounds of negligence, as contended by defendant, they are merely different aspects of the overall working conditions to which plaintiff was exposed and which were found by the jury to be unsafe. The instant case—more than either *Hadley* or *Blair*—was unquestionably a proper one for a general negligence submission.

Under the provisions of the Federal Employer's Liability Act, defendant was obligated to fulfill its nondelegable duty to provide plaintiff with reasonably safe conditions and reasonably safe appliances for work, stripped of its common law defenses and liable if its negligence played any part, however slight, in producing plaintiff's injuries. This is a statutory negligence action that makes it substantively different from the ordinary common law negligence action. 45 U.S.C. Section 51, *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 507-509, 77 S.Ct. 443, 448-450 (1957); *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 7, 83 S.Ct. 1667, 1671-1672 (1963). Under the FELA, juries are not limited in their consideration of the evidence, as they are under common law actions. *Chicago, Rock Island & Pacific R.R. v. Melcher,* 333 F.2d 996, 999-1000 (8th Cir. 1964). They are permitted to draw inferrences based

upon circumstantial evidence even though such inferrences might involve some speculation and conjecture. *Webb v. Illinois Central Railroad Co.,* 352 U.S. 512, 77 S.Ct. 451 (1957); *Lavender v. Kurn,* 327 U.S. 645, 653, 66 S.Ct. 740, 744 (1946). Plaintiff's verdict directing instruction properly submitted the ultimate issue of liability under the applicable substantive law.

Missouri rules concerning the form of approved instructions are procedural in nature. *Meredith v. Missouri Pacific Railroad Co.,* 467 S.W.2d 79, 82 (Mo. 1971). When, as here, an instruction in an F.E.L.A. case correctly states the substantive law and is clearly supported by the evidence, the form of the instruction is a matter left to state procedural law. *Union Pacific Railroad Co. v. Hadley,* 246 U.S. 330, 38 S.Ct. 318 (1918); *Minneapolis & St. Louis Railroad Co. v. Bombolis,* 241 U.S. 211, 36 S.Ct. 595 (1916); *C.f., Lyons v. State of Oklahoma,* 322 U.S. 596, 601, 64 S.Ct. 1208, 1212 (1944); *Brown v. Gerdes,* 321 U.S. 178, 189-190, 64 S.Ct. 487, 492-493 (1944) (concurring opinion).

The applicable substantive law and the evidence completely justified submission under MAI 24.01 in the instant case under the controlling decisions of this Court. Consequently, it is of no import that in many ordinary Missouri common law actions, submissions of specific negligence may be required. The difference in the substantive law and the evidence in the instant case provides a rational basis for submitting general negligence issues to the jury. Since there was a rational basis for treating the instant case differently from ordinary common law negligence actions, defendant's right to equal protection is not implicated. *G. D. Searle & Co. v. Cohn,* 455 U.S. 404, 408, 102 S.Ct. 1137, 1141 (1982).

II.

No Violation Of The Interstate Commerce Clause, Article One, Section Eight Of The United States Constitution, Has Or Can Be Demonstrated. In The Instant Case, Plaintiff Was Vindicating Federal Rights Granted To Him By The Congress Of The United States Under 45 U.S.C. §51 Et. Seq. The FELA Specifically Provides That Actions For The Recovery Of Damages Based Upon An Employer-Railroad's Negligence May Be Brought In State Court. Consequently, Plaintiff Was Vindicating His Federal Rights Pursuant To Federal Law And No State Regulation Of Interstate Commerce Occurred. Nor Has Any Undue Burden On Interstate Commerce Resulting From Any State Regulation Been Implicated.

In the instant case, defendant has totally failed to demonstrate that any state regulation of interstate commerce inconsistent with the federal law applicable to said interstate commerce has occurred. Quite to the contrary, plaintiff brought suit in the state court to vindicate federal rights granted under the FELA, 45 U.S.C. §51 et. seq. As set forth more fully above, the law applied by the Missouri state courts in the instant case was in complete harmony with the federal decisions under the FELA. Defendant's contention, therefore, that Missouri imposes an undue burden on interstate commerce must be flatly rejected. This Court in *Mondou v. New York, New Haven & Hartford Railroad Company,* 223 U.S. 1, 32 S.Ct. 169 expressly held that Congress's enactment of the FELA was properly based upon its authority to regulate interstate commerce, did not violate equal protection and that state courts had the duty to entertain suits brought by railroad employees injured in a furtherance of interstate commerce. An FELA plaintiff bringing suit in state court pursuant to 45 U.S.C. §56 is vindicating federal rights pursuant to specific congressional authorization, and not any rights created by the state. *Baltimore & O.R. Co. v. Kepner,* 314 U.S. 44, 52, 62 S.Ct. 6, 9-10 (1941). As a result, no *state* regulation of interstate commerce is in any manner implicated.

Secondly, defendant has completely failed to demonstrate any undue burden on interstate commerce. As noted in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Company,* 393 U.S. 130, 144, 89 S.Ct. 323, 331 where this Court rejected a defendant's contention that the Arkansas full crew laws violated the equal protection clause, or imposed an undue burden on interstate commerce, stating:

> "As we have said many times, Congress unquestionably has the power under the Commerce Clause to regulate the number of employees who shall be used to man trains used in interstate commerce. In the absence of Congressional action, however, we cannot invoke the judicial power to invalidate this judgment of the people of Arkansas and their elected representatives as to the price society should pay to promote safety in the railroad industry."

Moreover, as this Court has recognized a state does in fact have a legitimate interest in providing a proper remedy for its injured workers which outweighs the incidental burdens, if any, on interstate commerce. *Collins v. American Buslines, Inc.,* 350 U.S. 528, 531, 76 S.Ct. 582, 584 (1956). Consequently, even assuming *arguendo* that state regulation occurred, no undue burden on interstate commerce has been demonstrated.

In the instant case Congress has exercised its power under the Commerce Clause by enacting the FELA and authorizing employees to bring actions for damages in state court. The conduct of the instant trial was in complete conformity with the FELA. Consequently, the state imposed no burden of any type (and certainly no undue burden) on interstate commerce.

CONCLUSION

For all of the foregoing reasons, plaintiff (respondent) respectfully submits that the judgment of the Missouri Court of Appeals, below, is entirely correct and that the same does not warrant review by the court. For that reason, it is further respectfully submitted and urged that the petition for writ of certiorari in the instant case should be denied.

Respectfully submitted,

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